No. 96-667

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT E. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a defendant has an absolute right to withdraw his guilty plea after the district court has accepted it but before the district court has decided whether to accept or reject an accompanying plea agreement.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-5a) is reported at 82 F.3d 319. The order of the court of appeals (Pet. App. 6a-7a) amending the opinion and denying a petition for rehearing is reported at 92 F.3d 779. The order of the district court denying respondent's motion to withdraw his guilty plea (Pet. App. 8a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1996. A petition for rehearing was denied on July 29, 1996. Pet. App. 6a-7a. The petition for a writ of certiorari was filed on October 28, 1996, and was granted on January 17, 1997. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES AND GUIDELINES PROVISIONS INVOLVED

Rules 11 and 32 of the Federal Rules of Criminal Procedure and Sentencing Guidelines Section 6B1.1 are reproduced at App., *infra*, 1a-14a.

STATEMENT

1. On December 13, 1991, a grand jury in the Northern District of California returned an indictment (J.A. 5-13) charging respondent as principal and as accessory with three counts of mail fraud, in violation of 18 U.S.C. 1341; three counts of wire fraud, in violation of 18 U.S.C. 1343; and two counts of receiving stolen property, in violation of 18 U.S.C. 2315. The charges arose from a bogus loan brokerage scheme, under which respondent would allegedly promise to obtain loans on behalf of his victims, in return for their payment of up-front application fees. Although the victims paid the fees, respondent allegedly failed to arrange for the loans. Pet. App. 9a.

2. On November 29, 1993, the date set for the commencement of trial, respondent and the government entered into a written plea agreement. J.A. 21-27. That agreement provided that respondent would plead guilty to two of the mail fraud counts and to the two counts charging receipt of stolen property. J.A. 21. The agreement also provided that the government would move to dismiss the remaining four counts with which respondent was charged, *ibid.*, and would not bring further charges based on respondent's participation in the loan brokerage scheme or based on certain other past activities of respondent, J.A. 22-23. Finally, the agreement stated that respondent and the government agreed on a number of details concerning the application of the Sentencing Guidelines to this case and the calculation of the amount of restitution

that should be ordered. J.A. 23-24. The agreement recognized, however, that "[t]he district court will be free to make its own determinations pursuant to the Guidelines" and it stated that "[t]he defendant understands that the final decision as to which Guidelines apply rests with the court." J.A. 25.

That same afternoon, respondent pleaded guilty in open court to the four counts specified in the plea agreement. See J.A. 28-55. In conducting the colloquy required by Federal Rule of Criminal Procedure 11 for the taking of a guilty plea, the court addressed respondent and ascertained that respondent knew the nature of the charges and possible punishment, that respondent was willing to waive his various trial rights by virtue of his guilty plea, and that respondent's plea was knowing and voluntary. J.A. 34-52. The court also ascertained that respondent understood the plea agreement, the obligations it imposed on each party, and the continuing final authority of the court to determine an appropriate sentence in accord with the Sentencing Guidelines. J.A. 40-42.

Of particular relevance to this case, the court informed respondent that "I may accept or reject [the plea] agreement today, or I may reserve ruling to accept or reject the plea agreement pending completion of the presentence report." J.A. 41. The court asked respondent to state in his own words what he had done that led him to plead guilty to each of the four counts. The court also asked the government to set forth the factual basis for each charge, and the court confirmed that respondent agreed with the government's statements about the offenses. J.A. 42-50. The court asked respondent whether he had

committed the crimes charged, and respondent replied "Yes, Your Honor, I did." J.A. 51.

The court then reviewed the maximum sentences that could be imposed, J.A. 51-52, and the court ascertained that respondent had no objection to the advice he had received from his advisory counsel, J.A. 53. Finally, the court inquired how respondent pleaded to each of the four counts. With respect to each count, respondent answered, "Guilty, Your Honor." J.A. 53-54. The district court said, "The Court accepts the guilty plea." J.A. 54. The court also stated that it "reserves ruling on whether to accept the plea agreement pending completion of the presentence report." *Ibid.* The court filed a written order providing "that [respondent's] plea of 'GUILTY' be accepted." J.A. 20.

3. On December 23, 1993, respondent filed a motion pursuant to Federal Rule of Criminal Procedure 32(e) to withdraw his guilty plea on grounds of duress, claiming that the prosecutor and other Department of Justice officials had threatened harm to his wife. J.A. 56-57.[1] There followed a series of proceedings, including a hearing at which respondent failed to present evidence supporting his claim, see Pet. App. 10a; J.A. 58-61; respondent's submission of a "vague

[1] The caption of the motion indicated that it was filed "pursuant to F.R.C.P. Rule 32(d)." See J.A. 56. In January 1994, when respondent's motion was filed, the rule governing withdrawal of guilty pleas was codified as Rule 32(d). It was recodified as Rule 32(e) when Rule 32 was amended in 1994. Both before and after that change in designation, the rule provided in relevant part: "If a motion to withdraw a plea of guilty * * * is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason."

and conclusory" unsigned, unsworn statement by respondent's wife, see Pet. App. 11a; and an evidentiary hearing at which respondent introduced the testimony of his wife and daughter, and the government introduced the testimony of the FBI agent who was alleged to have threatened respondent's wife, see Pet. App. 12a; J.A. 62-65.

On July 19, 1994, the court issued a memorandum and order denying respondent's motion to withdraw his plea. Pet. App. 8a-18a. The court noted that, under Federal Rule of Criminal Procedure 32, a defendant may withdraw a guilty plea before sentencing "upon a showing by the defendant of any fair and just reason." See Pet. App. 12a. In this case, the court held, "[t]here is absolutely no credible evidence to support [respondent's] claim" of duress. *Id.* at 13a. The court also found that "[t]here is * * * no evidence that [the FBI agent] improperly threatened or coerced [respondent's wife]." *Id.* at 14a. Finding that "[respondent] lacks any semblance of credibility," *id.* at 16a, the court ruled "that [respondent] entered his guilty plea knowingly, voluntarily and intelligently." *Ibid.* The court also rejected respondent's claim that the court had committed error under Rule 11 at the guilty plea hearing. *Id.* at 16a-17a.

The court subsequently sentenced respondent to 30 months' imprisonment, to be followed by three years' supervised release, and ordered that he make restitution in the amount of approximately $477,990. J.A. 75-80.

4. The court of appeals reversed. The court held that the requirement of Federal Rule of Criminal Procedure 32(e) of a "fair and just reason" for withdrawing a plea of guilty was inapplicable in this case.

The court observed that "when a defendant makes a motion to withdraw his guilty plea before the district court has accepted that plea, he need not offer any reason at all for his motion; the court must permit the withdrawal." Pet. App. 2a. The court noted respondent first moved to withdraw the plea almost a month after the court had accepted it, but concluded that that fact was irrelevant, because the district court had not yet accepted the plea agreement. The court explained that

> [t]he plea agreement and the plea are 'inextricably bound up together' such that the deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea. This is so even though the court explicitly stated that it accepted [the] plea.

Id. at 3a (quoting *United States* v. *Cordova-Perez*, 65 F.3d 1552, 1556 (9th Cir. 1995), cert. denied, 117 S. Ct. 113 (1996)). The court concluded that

> [i]f the court defers acceptance of the plea or of the plea agreement, the defendant may withdraw his plea for any reason or for no reason, until the time that the court does accept both the plea and the agreement. Only after that must a defendant who wishes to withdraw show a reason for his desire.

Pet. App. 4a. The court therefore reversed respondent's conviction "so that he can plead anew." *Ibid.*

Judge Ferguson filed a brief concurring opinion (Pet. App. 5a), in which he stated that while he disagreed with the result, he believed that it followed from the Ninth Circuit's decision in *United States* v. *Cordova-Perez*.

SUMMARY OF ARGUMENT

Under the Federal Rules of Criminal Procedure, a guilty plea must be tendered personally by a defendant in open court and a court must follow careful procedures before deciding whether to accept the guilty plea. Once the district court has accepted a guilty plea, the Rules contain two provisions governing withdrawal of the plea before sentencing. Under Rule 32(e), a defendant may withdraw a guilty plea on a showing of a "fair and just reason." Under Rule 11(e)(4), a defendant has an absolute option to withdraw a guilty plea if the district court has rejected an accompanying plea agreement. The district court in this case correctly found that respondent's request to withdraw his guilty plea satisfied neither of those standards; respondent proffered no "fair and just reason," and the district court had not rejected the plea agreement.

The Ninth Circuit did not disagree with the district court's findings that respondent failed to satisfy the standards of Rule 32(e) and Rule 11(e)(4). The court's determination that respondent should nonetheless be permitted freely to withdraw his guilty plea—"for any reason or for no reason"—therefore conflicts with the explicit provisions, as well as the underlying policies, of both Rules.

The court of appeals attempted to justify its rule of free withdrawal from guilty pleas on the ground that such a rule is justified where the district court has never really accepted the plea in the first place. In the Ninth Circuit's view, the district court's apparent acceptance of the guilty plea in this case must be disregarded because the district court at the same

time deferred decision on whether to accept the accompanying plea agreement.

There is no legal basis for the court of appeals' holding that a district court's acceptance of a guilty plea must be disregarded until such time as the district court has accepted an accompanying plea agreement. The Federal Rules nowhere condition the court's acceptance of a guilty plea on its acceptance of an accompanying plea agreement. Rather, the Rules expressly provide that courts may accept guilty pleas when tendered while deferring decision on whether to accept or reject an accompanying plea agreement. A court may not disregard the Rules on the ground of a perceived injustice, but, in any event, there is nothing unjust about holding a defendant to his guilty plea in the absence of a "fair and just reason."

The Ninth Circuit's rule of free withdrawal would encourage gamesmanship by defendants seeking to delay their trial. In addition, by converting a defendant's confession to a crime and guilty plea into a statement revocable at will for a period of months after it has been tendered and accepted in open court, the court of appeals' rule reduces respect for judicial proceedings and for the rule of law.

ARGUMENT

A DEFENDANT HAS NO RIGHT TO WITHDRAW A GUILTY PLEA AFTER THE DISTRICT COURT HAS ACCEPTED IT ABSENT THE SHOWING OF A FAIR AND JUST REASON OR THE REJECTION OF AN ACCOMPANYING PLEA AGREEMENT

The Ninth Circuit held that a defendant who has pleaded guilty to a crime, but who has also entered into a plea agreement, may withdraw his guilty plea for any reason—or for no reason at all—at any time

before the court's acceptance of the plea agreement. In most circumstances, district courts postpone a decision whether to accept a plea agreement until a presentence report has been prepared and the court has had the opportunity to review it. Accordingly, under the Ninth Circuit's ruling, a knowing and voluntary guilty plea made with full procedural safeguards and due formality in open court amounts merely to a statement by the defendant that he may or may not have committed the crime and that he may or may not demand a trial on the charges against him; the guilty plea has no binding effect whatsoever for a prolonged period, until a presentence report has been prepared, objections have been made, and the court has determined whether to accept the plea agreement.

The Ninth Circuit's rule is contrary to express provisions of the Federal Rules of Criminal Procedure, and it threatens to introduce substantial instability into the plea bargaining process that is pivotal to the resolution of the majority of federal criminal cases. Accordingly, it should be reversed.

A. The Federal Rules of Criminal Procedure Narrowly Limit The Circumstances Under Which A Guilty Plea, Once Accepted By A Court, May Be Withdrawn

1. Rule 11 of the Federal Rules of Criminal Procedure contains a set of detailed requirements that must accompany the entry and acceptance of a guilty plea. The rule provides that, "[b]efore accepting a plea of guilty * * *, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands," a number of crucial facts. Fed. R. Crim. P. 11(c). Those include the nature of the charge, the

maximum and minimum penalties to which the defendant will be subject, and the defendant's rights to representation by an attorney at every stage of the proceeding, to trial by jury, to confront and cross-examine witnesses, and to the privilege against compelled self-incrimination. *Ibid.* The court must also ensure, "by addressing the defendant personally in open court," that the defendant's plea is "voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. P. 11(d). In addition, the court "should not enter a judgment upon [a guilty] plea without making such inquiry as shall satisfy it that there is a factual basis for the plea." Fed. R. Crim. P. 11(f).

Rule 11's detailed procedures for entering a valid guilty plea reflect the fact "[t]hat a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady* v. *United States*, 397 U.S. 742, 748 (1970). As *Brady* explained, "[c]entral to the plea * * * is the defendant's admission in open court that he committed the acts charged in the indictment." *Ibid.* The procedures required for entry and acceptance of a guilty plea are therefore designed to ensure that the defendant knows precisely the significance and consequences of making that admission. Where the proper procedures are followed and where the defendant has publicly admitted to having committed the offense charged, the defendant's admission is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim." *United States* v. *Barker*, 514 F.2d 208, 221 (D.C. Cir.), cert. denied, 421 U.S. 1013 (1975).

2. Rule 11 also provides for plea agreements and for their acceptance. Such agreements may contain

promises that the government will take three sorts of actions:

> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case.

Fed. R. Crim. P. 11(e)(1). The Rule differentiates the treatment of plea agreements that provide for the dismissal of charges or the imposition of a specific sentence (agreements under subdivisions (A) and (C) above) from plea agreements that provide only for nonbinding recommendations as to the sentence (agreements under subdivision (B) above). The Rule also specifies what options are available to a defendant if a court, after having accepted a guilty plea, later rejects an accompanying charge-dismissal or specific-sentence agreement.

a. Rule 11 expressly provides for the district court to defer its decision whether to accept a Rule 11(e)(1)(A) or Rule 11(e)(1)(C) plea agreement—*i.e.*, an agreement providing for dismissal of charges or imposition of a specific sentence. In the case of such agreements, "the court may accept or reject the agreement, *or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.*" Fed. R. Crim. P. 11(e)(2) (emphasis added). The primary purpose of permitting such deferral is to allow time for the preparation of a presentence report and its review

by the district court. The court may thereby review the detailed factual information ordinarily included in the presentence report and ensure that the dismissal of the charges or the imposition of a particular sentence in accordance with the agreement is consistent with the public interest in the just disposition of criminal charges. The Sentencing Guidelines generally require the district court to defer its decision on a charge-dismissal or specific-sentence plea agreement. See Sentencing Guidelines § 6B1.1(c) ("The court shall defer its decision * * * to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report.").[2] That requirement enables the court to ensure that such a plea agreement contemplates appropriate treatment of the defendant under the Guidelines, so that the agreement does not impair the Guidelines' purpose of preventing unwarranted disparities in sentencing. See, *e.g.*, 28 U.S.C. 994(f); *Mistretta* v. *United States*, 488 U.S. 361, 366-367 (1989).

Rule 11 also states what happens when the court accepts or rejects a charge-dismissal or a specific-sentence agreement. Under Rule 11(e)(3), "[i]f the

[2] Sentencing Guidelines Section 6B1.1(c) provides an exception for cases where "a [presentence] report is not required under § 6A1.1." Sentencing Guidelines Section 6A1.1 in turn provides that "[a] probation officer shall conduct a presentence investigation and report to the court before the imposition of sentence unless the court finds that there is information in the record sufficient to enable the meaningful exercise of sentencing authority pursuant to 18 U.S.C. § 3553, and the court explains this finding on the record." Under this provision, presentence reports are required in the vast majority of federal criminal cases.

court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement." On the other hand, under Rule 11(e)(4), "[i]f the court rejects the plea agreement, the court shall * * * inform the parties * * * that the court is not bound by the plea agreement [and] afford the defendant the opportunity to then withdraw the plea." The Rule adds that the court must "advise the defendant that if the defendant persists in a guilty plea * * * the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement." *Ibid.* Thus, once a court rejects an agreement on which the defendant relied in pleading guilty, the defendant may—based on his own assessment of the risks and benefits—either adhere to the plea or withdraw from it and go to trial. See *United States* v. *Ellison*, 798 F.2d 1102, 1105 (7th Cir. 1986), cert. denied, 479 U.S. 1038 (1987).[3]

[3] The Rules treat plea agreements that provide only for nonbinding recommendations concerning what sentence to impose—agreements made under Rule 11(e)(1)(B)—differently from agreements providing for dismissal of charges or imposition of a definite sentence. In the case of such a recommended-sentence agreement, the parties have expressly agreed "that such recommendation or request shall not be binding upon the court." Fed. R. Crim. P. 11(e)(1)(B). Because the agreement does not purport to commit the court to taking any particular action, a court would have no reason to reject such an agreement—though it may of course choose not to follow the nonbinding sentencing recommendation embodied in the agreement. Nor would the defendant be able to claim that he relied on imposition of any particular sentence in entering into the agreement and tendering his guilty plea. Accordingly, the Rules provide that in the case of such an agreement, "the court shall advise the defendant that if the court does not accept the

3. Rule 11(e)(4)'s provision for withdrawal of a guilty plea at the defendant's option when the court rejects an accompanying plea agreement states the only circumstance in which the defendant may unilaterally withdraw a plea. Any other request to withdraw an accepted plea must satisfy the requirements of Rule 32(e). That Rule provides: "If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Fed. R. Crim. P. 32(e). See also *Kercheval* v. *United States*, 274 U.S. 220, 224 (1927) (pre-Rules use of "fair and just reason" standard).

Rule 32(e) grants a district court limited authority to permit withdrawals of a guilty plea at any time "before sentence is imposed." Fed. R. Crim. P. 32(e). It "does not provide an absolute right to withdraw a plea"; rather "[t]he defendant has the burden of proving that withdrawal is justified." *United States* v. *Moore*, 37 F.3d 169, 172 (5th Cir. 1994); see, *e.g.*, *United States* v. *Boone*, 869 F.2d 1089, 1091 (8th Cir.), cert. denied, 493 U.S. 822 (1989); *Government of Virgin Islands* v. *Berry*, 631 F.2d 214, 219-220 (3d Cir. 1980) (earlier version of Rule 32(e)); see also Amendments to Rules, 97 F.R.D. 245, 312 (1983). The defendant's withdrawal "must rest on something more than the defendant's second thoughts about some fact or point of law, or about the wisdom of his earlier decision." *United States* v. *Parrilla-Tirado*, 22 F.3d 368, 371 (1st Cir. 1994) (citations omitted).

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recommendation or request [as to sentencing] the defendant nevertheless has no right to withdraw the plea." Fed. R. Crim. P. 11(e)(2).

Where the defendant has made a showing sufficient to satisfy that standard, however, relief from the guilty plea is authorized. See, *e.g.*, *United States* v. *Martinez-Molina*, 64 F.3d 719, 733-734 (1st Cir. 1995); *United States* v. *Groll*, 992 F.2d 755 (7th Cir. 1993); *United States* v. *Syal*, 963 F.2d 900 (6th Cir. 1992). Otherwise, a duly accepted guilty plea should stand.

B. The Ninth Circuit's Rule Permitting Respondent To Withdraw His Guilty Plea "For Any Reason Or For No Reason" Is Inconsistent With Rules 11 and 32

The Ninth Circuit's rule permitting a defendant freely to withdraw a guilty plea at any time before the court accepts an accompanying plea agreement is inconsistent with the carefully drafted provisions of the Federal Rules of Criminal Procedure set forth above. Under those provisions, "once a plea of guilty is accepted by the court, the defendant is bound by his choice and may withdraw his plea only in two ways relevant here, either by showing a fair and just reason under Rule 32[(e)], or by withdrawing under Rule 11(e)(4) after a rejected plea agreement." *United States* v. *Ewing*, 957 F.2d 115, 119 (4th Cir.), cert. denied, 505 U.S. 1210 (1992); see also *Ellison*, 798 F.2d at 1104-1105. Because respondent did not "show[] a fair and just reason" and the district court did not reject the plea agreement, the Ninth Circuit erred in holding that respondent may simply repudiate his guilty plea.

The Ninth Circuit attempted to justify its rule based on two propositions. First, the court stated that a defendant is free to withdraw his guilty plea before the district court has accepted it. Second, the court stated that "[t]he plea agreement and the plea are 'inextricably bound up together' such that the

deferment of the decision whether to accept the plea agreement carried with it postponement of the decision whether to accept the plea." Pet. App. 3a. Putting those two propositions together, the court of appeals concluded that a defendant is free to withdraw his guilty plea until the district court has accepted the plea agreement.

We assume for present purposes that the court of appeals' first premise is correct: Until the district court accepts a guilty plea, the defendant is free to withdraw it. See *United States* v. *Washman*, 66 F.3d 210, 212-213 (9th Cir. 1995). The court of appeals clearly erred, however, in holding that, when a district court defers a decision regarding whether to accept a plea agreement, it necessarily also defers a decision regarding whether to accept a guilty plea. That holding is without foundation and threatens to inject instability into the resolution of criminal cases through guilty pleas.

1. The court of appeals' holding that the district court necessarily deferred its decision whether to accept respondent's guilty plea when it deferred decision on the plea agreement is directly contrary to what the district court actually did. At the guilty plea hearing on November 29, 1993, the district court complied with all of the requirements of Rule 11. At the completion of the colloquy with respondent, the court stated: "*The court accepts the guilty plea.* The court reserves ruling on whether to accept the plea agreement pending completion of the presentence report." J.A. 54 (emphasis added). Moreover, on the same day, the court filed a written "Order Accepting Guilty Plea." J.A. 20. The Order recited that respondent had entered his plea "freely and voluntarily," that respondent "understands and knowingly * * *

waives his/her Constitutional rights," that respondent "freely and voluntarily" applied to enter a guilty plea, and that respondent "has admitted the essential elements of the crime charged." *Ibid.* The Order then stated: "IT IS THEREFORE ORDERED that [respondent's] plea of 'GUILTY' be accepted and entered as prayed for." *Ibid.* On this record, there is no room for ambiguity regarding the district court's acceptance of respondent's guilty plea.[4]

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[4] The plea agreement in this case recited that it was being entered into pursuant to Rule 11(e)(1)(B). See J.A. 21. That, however, appears to have been an error. Although the agreement did contain certain provisions regarding how the parties believed that the Guidelines should be applied in this case, J.A. 23-24, the agreement did not contain a recommendation regarding the ultimate sentence to be imposed, which is the hallmark of a Rule 11(e)(1)(B) agreement. And because the agreement did provide for the government to dismiss certain charges, it was appropriately viewed as a Rule 11(e)(1)(A) agreement. See J.A. 21; see also Fed. R. Crim. P. 11(e), Notes of the Advisory Committee on Rules, 1979 Amendments. Noting these characteristics of the agreement, the district court at the plea hearing stated that it should be classified as a Rule 11(e)(1)(A) agreement. J.A. 41. The government agreed, without objection from respondent. *Ibid.*

Even if the district court erred in classifying the plea agreement under Rule 11(e)(1)(A), that would be of no consequence in this case. The only difference in the treatment of a charge-dismissal agreement under Rule 11(e)(1)(A) and a recommended-sentence agreement under Rule 11(e)(1)(B) is that, if the court rejects a charge-dismissal agreement, the defendant may freely withdraw his plea of guilty, while the defendant has no such right to withdraw his plea after entering into a Rule 11(e)(1)(B) agreement. Because the district court did not reject any portion of the plea agreement in this case, the classification of the agreement could have made no difference regarding respondent's right to withdraw his guilty plea.

2. The court of appeals did not maintain that the district court had actually deferred its acceptance of respondent's guilty plea. Rather, the court of appeals adopted a counterfactual principle of law that posits that whenever a district court postpones acceptance of a plea agreement, it necessarily defers its decision whether to accept the underlying guilty plea. See Pet. App. 3a. That principle, however, is entirely unfounded.

First, as noted above, there is nothing in the Federal Rules of Criminal Procedure that prohibits a district court from accepting a guilty plea before the district court has decided whether to accept a plea agreement. Rule 11 does impose certain requirements on the district court before it may accept a guilty plea. It provides that, "*[b]efore accepting a plea of guilty* * * *, the court must address the defendant personally in open court" and determine that the defendant understands the facts, the law, and the rights he is waiving. Fed. R. Crim. P. 11(c) (emphasis added). The Rule also provides that "*[t]he court shall not accept a plea of guilty* * * * *without first* * * * *determining* that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." Fed. R. Crim. P. 11(d) (emphasis added). The Rule also specifically envisions that the absence of a factual basis does not vitiate the district court's ability to accept a plea, though it does preclude the district court from entering judgment on it. See Fed. R. Crim. P. 11(f) ("*Notwithstanding the acceptance of a plea of guilty*, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.") (emphasis added). And a separate subdivision of Rule 11 governs

plea agreement procedure, with the express provision that a court may defer its acceptance or rejection of the plea *agreement* pending consideration of the presentence report. Fed. R. Crim. P. 11(e)(2). There is no parallel provision in Rule 11 requiring simultaneous deferral of acceptance or rejection of the *guilty plea*.

Rule 11 therefore carefully sets forth what is (and, in one instance, what is not) required before a court may validly accept a guilty plea. None of those provisions prohibits a court from accepting a guilty plea until it also accepts an accompanying plea agreement. Nor can any of those provisions reasonably be read to imply such a prohibition. Indeed, the provision of Rule 11(e)(4) granting a defendant an express right freely to withdraw a guilty plea if the court rejects an accompanying plea agreement would make little sense unless it is assumed that, at the time the court rejects the plea agreement, the defendant would be otherwise bound by a guilty plea that had already been properly accepted by the court.

Second, a court may not disregard the Federal Rules of Criminal Procedure even if the court believes they lead to an unfair or unjust result. See *Carlisle* v. *United States*, 116 S. Ct. 1460, 1466 (1996) (court may not "develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure"); *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988). But, in any event, the provisions at issue in this case are fair and reasonable. No defendant is required to plead guilty. Rule 32(e) in plain terms informs all participants that a guilty plea, once accepted by the court, may be withdrawn before sentencing only on a showing of a "fair and just reason." Consequently, if a defendant confesses to

his crime in open court at his plea proceeding, there is no injustice in holding the defendant to the consequences of his action. Indeed, the Rules' emphasis on the binding nature of the guilty plea has the salutary effect of reminding the defendant that a guilty plea should not be entered into lightly with the expectation that it may be retracted if and when the defendant has second thoughts. By contrast, the rule of free withdrawal from a guilty plea adopted by the Ninth Circuit would encourage an uncommitted defendant to enter a guilty plea and convince a district court to accept it, secure in the knowledge that the defendant will have a substantial period of time to repudiate his decision with no risk or cost.

Third, the only rationale for adopting a rule that a court may not accept a guilty plea until it has accepted an accompanying plea agreement would be the view that a defendant should have the opportunity to review the presentence report—and thereby gain a preview into his likely sentence—before finally committing himself to his plea. But that rationale has been squarely rejected by the Federal Rules in cases where the defendant has been unable to obtain a Rule 11(e)(1)(C) specific-sentence plea agreements. See *United States* v. *Horne*, 987 F.2d 833, 838 (D.C. Cir.), cert. denied, 510 U.S. 852 (1993); *United States* v. *Ludwig*, 972 F.2d 948, 951 (8th Cir. 1992); *United States* v. *Jackson*, 983 F.2d 757, 770 (7th Cir. 1993). All defendants who want to plead guilty must first be informed of the maximum possible sentence they face if their plea is accepted. See Fed. R. Crim. P. 11(c)(1). If a defendant who has obtained only a charge-dismissal agreement is willing to plead guilty knowing that that maximum sentence may be imposed, any sentence less than or equal to the

maximum can give him no reasonable ground for complaint.

3. Quite apart from the fact that the Ninth Circuit's rule conflicts with the Federal Rules of Criminal Procedure, precluding a court from accepting a guilty plea before the court has decided whether to accept a plea agreement would have serious adverse practical consequences. That rule encourages defendants to engage in manipulation and gamesmanship. For example, a defendant may delay a trial several months or longer—and put the government and the court to the substantial expense of needless trial preparation and needless preparation and review of a presentence report—simply by entering into a plea agreement and guilty plea on the eve of trial and then withdrawing his plea just before sentencing. Procedural rules should not be framed to permit that sort of manipulation.

The gap in Rule 32(e) opened by the Ninth Circuit's rule is a large one. Rule 32(e)'s "fair and just reason" standard applies "before sentence is imposed"—*i.e.*, during the time between the entry of a guilty plea and the time sentence is imposed. The Ninth Circuit's competing rule of free withdrawal would, however, apply to any case in which (a) the court has accepted a guilty plea at the Rule 11 plea proceeding, and (b) the court has deferred accepting an accompanying plea agreement until it has had the opportunity to review the presentence report.[5] District courts generally

[5] The vast majority of pleas of guilty in federal court are accompanied by plea agreements. See Fed. R. Crim. P. 11(e), Notes of the Advisory Committee on Rules, 1974 Amendments ("guilty pleas account for the disposition of as many as 95% of all criminal cases," and "[a] substantial number of these are the result of plea discussions"); see also *Blackledge* v. *Allison*, 431

accept guilty pleas at the Rule 11 proceeding, so that preparation of the presentence report may be commenced and preparation for trial ended. And, as discussed above, see pp. 12-13, *supra*, courts ordinarily defer decision on whether to accept the plea agreement until they can review the presentence report.[6] Thus, the net effect of the Ninth Circuit's rule would be to displace Rule 32(e)'s "fair and just

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U.S. 63, 71 (1977) ("the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system"); *Santobello* v. *New York*, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions * * * leads to prompt and largely final disposition of most criminal cases.").

[6] Under Federal Rule of Criminal Procedure 32(b)(6)(C), the presentence report must be submitted to the court for its review "not later than 7 days before the sentencing hearing." Before that time, the probation office must gather detailed "information about the defendant's history and characteristics, including any prior criminal record, financial, condition, and any circumstances that * * * may be helpful in imposing sentence" and "an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed." Fed. R. Crim. P. 32(b)(4)(A) and (D). In addition, the presentence report must ordinarily be furnished to the defendant and the government not later than 35 days before the sentencing hearing, Fed. R. Crim. P. 32(b)(6)(A), the parties must make whatever objections they have to the report not later than 14 days before the sentencing hearing, Fed. R. Crim. P. 32(b)(6)(B), and the probation officer must then conduct any further investigation and prepare whatever addenda to the report are appropriate, Fed. R. Crim. P. 32(b)(6)(B). Accordingly, there is often a substantial period between the time the defendant pleads guilty and the time when the presentence report is furnished to the court, and the court frequently is in a position to review the presentence report and determine whether to accept the plea agreement only at or very near the time of sentencing.

reason" standard in most cases from the time of entry of the guilty plea until the presentence report is prepared, at or near sentencing—*i.e.*, in most cases during virtually the entire period of time in which the "fair and just reason" standard was intended to be operative.

In addition, the court of appeals' decision reduces respect for judicial proceedings. It converts the defendant's solemn confession of guilt, made in open court during a guilty plea proceeding, into a statement that is revocable at will and that in most cases will have no legal effect unless and until the defendant later decides that it is advantageous to adhere to it. As the Advisory Committee commented when it added the "fair and just reason" standard to Rule 32(e), "[g]iven the great care with which pleas are taken under th[e] revised Rule 11, there is no reason to view pleas so taken as merely 'tentative,' subject to withdrawal before sentence." 97 F.R.D. at 313.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1997

APPENDIX

STATUTORY PROVISIONS AND RULES

1. Rule 11 of the Federal Rules of Criminal Procedure provides:

Rule 11. Pleas

(a) Alternatives.

(1) In General. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) Conditional Pleas. With the approval of the court and the consent of the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided

by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on

the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea disussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo

contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

(h) Harmless Error. Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.

2. Rule 32 of the Federal Rules of Criminal Procedure provides:

Rule 32. Sentence and Judgment

(a) In General; Time for Sentencing. When a presentence investigation and report are made under subdivision (b)(1), sentence should be imposed without unnecessary delay following completion of the process prescribed by subdivision (b)(6). The time limits prescribed in subdivision (b)(6) may be either shortened or lengthened for good cause.

(b) Presentence Investigation and Report.

(1) When Made. The probation officer must make a presentence investigation and submit a report to the court before the sentence is imposed unless:

(A) the court finds that the information in the record enables it to exercise its sentencing authority meaningfully under 18 U.S.C. § 3553; and

(B) the court explains this finding on the record.

(2) Presentence of Counsel. On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation.

(3) Nondisclosure. The report must not be submitted to the court or its contents disclosed to anyone unless the defendant has consented in writing, has pleaded guilty or nolo contendere, or has been found guilty.

(4) Contents of the Presentence Report. The presentence report must contain—

(A) information about the defendant's history and characteristics, including any prior criminal record, financial condition, and any circumstances that, because they affect the defendant's behavior, may be helpful in imposing sentence or in correctional treatment;

(B) the classification of the offense and of the defendant under the categories established by the Sentencing Commission under 28 U.S.C. § 994(a), as the probation officer believes to be applicable to the defendant's case; the kinds of sentence and the sentencing range suggested for such a category of offense committed by such a category of defendant as set forth in the guidelines issued by the Sentencing Commission under 28 U.S.C. § 994(a)(1); and the probation officer 's explanation of any factors that may suggest a different sentence—within or without the applicable guideline—that would be more appropriate, given all the circumstances;

(C) a reference to any pertinent policy statement issued by the Sentencing Commission under 28 U.S.C. § 994(a)(2);

(D) verified information, stated in a nonargumentative style, containing an assessment of the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(E) in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant;

(F) any report and recommendation resulting from a study ordered by the court under 18 U.S.C. § 3552(b); and

(G) any other information required by the court.

(5) Exclusions. The presentence report must exclude:

(A) any diagnostic opinions that, if disclosed, might seriously disrupt a program of rehabilitation;

(B) sources of information obtained upon a promise of confidentiality; or

(C) any other information that, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons.

(6) Disclosure and Objections.

(A) Not less than 35 days before the sentencing hearing—unless the defendant waives this minimum period—the probation officer must furnish the presentence report to the defendant, the defendant's counsel, and the attorney for the Government. The court may, by local rule or in individual cases, direct that the probation officer

not disclose the probation officer's recommendation, if any, on the sentence.

(B) Within 14 days after receiving the presentence report, the parties shall communicate in writing to the probation officer, and to each other, any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the presentence report. After receiving objections, the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss those objections. The probation officer may also conduct a further investigation and revise the presentence report as appropriate.

(C) Not later than 7 days before the sentencing hearing, the probation officer must submit the presentence report to the court, together with an addendum setting forth any unresolved objections, the grounds for those objections, and the probation officer's comments on the objections. At the same time, the probation officer must furnish the revisions of the presentence report and the addendum to the defendant, the defendant's counsel, and the attorney for the Government.

(D) Except for any unresolved objection under subdivision (b)(6)(B), the court may, at the hearing, accept the presentence report as its findings of fact. For good cause shown, the court may allow a new objection to be raised at any time before imposing sentence.

(c) Sentence

(1) Sentencing Hearing. At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objections to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

(2) Production of Statements at Sentencing Hearing. Rule 26.2(a)-(d) and (f) applies at a sentencing hearing under this rule. If a party elects not to comply with an order under Rule 26.2(a) to deliver a statement to the movant, the court may not consider the affidavit or testimony of the witness whose statement is withheld.

(3) Imposition of Sentence. Before imposing sentence, the court must:

(A) verify that the defendant and defendant's counsel have read and discussed the presentence report made available under subdivision (b)(6)(A). If the court has received information excluded from the presentence report under subdivision (b)(5) the court—in lieu of making that information available—must summarize it in writing, if the information will be relied on in determining sentence. The court must also give the defendant and the defendant's counsel a reasonable opportunity to comment on that information;

(B) afford defendant's counsel an opportunity to speak on behalf of the defendant;

(C) address the defendant personally and determine whether the defendant wishes to make a statement and to present any information in mitigation of the sentence;

(D) afford the attorney for the Government an opportunity equivalent to that of the defendant's counsel to speak to the court; and

(E) if sentence is to be imposed for a crime of violence or sexual abuse, address the victim personally if the victim is present at the sentencing hearing and determine if the victim wishes to make a statement or present any information in relation to the sentence.

(d) Judgment

(1) In General. A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment must be entered according. The judgment must be signed by the judge and entered by the clerk.

(2) Criminal Forfeiture. When a verdict contains a finding of criminal forfeiture, the judgment must authorize the Attorney General to seize the

interest or property subject to forfeiture on terms that the court consider proper.

(e) Plea Withdrawal. If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. § 2255.

(f) Definitions. For purposes of this rule—

(1) "victim" means any individual against whom an offense has been committed for which a sentence is to be imposed, but the right of allocation under subdivision (c)(3)(E) may be exercised instead by—

(A) a parent or legal guardian if the victim is below the age of eighteen years or incompetent; or

(B) One or more family members or relatives designated by the court if the victim is deceased or incapacitated;
if such person or persons are present at the sentencing hearing, regardless of whether the victim is present; and

(2) "crime of violence or sexual abuse" means a crime that involved the use of attempted or threatened use of physical force against the person or property of another, or a crime under chapter 109A of title 18, United States Code.

3. Sentencing Guidelines § 6B1.1 provides, in pertinent part:

§ 6B1.1. PLEA AGREEMENT PROCEDURE (POLICY STATEMENT)

(a) If the parties have reached a plea agreement, the court shall, on the record, require

disclosure of the agreement in open court or, on a showing of good cause, in camera. Rule 11(e)(2), Fed. R. Crim. P.

(b) If the plea agreement includes a nonbinding recommendation pursuant to Rule 11(e)(1)(B), the court shall advise the defendant that the court is not bound by the sentencing recommendation, and that the defendant has no right to withdraw the defendant's guilty plea if the court decides not to accept the sentencing recommendation set forth in the plea agreement.

(c) The court shall defer its decision to accept or reject any nonbinding recommendation pursuant to Rule 11(e)(1)(B), and the court's decision to accept or reject any plea agreement pursuant to Rules 11(e)(1)(A) and 11(e)(1)(C) until there has been an opportunity to consider the presentence report, unless a report is not required under § 6A1.1.

Commentary

This provision parallels the procedural requirements of Rule 11(e), Fed. R. Crim. P. Plea agreements must be fully disclosed and a defendant whose plea agreement includes a nonbinding recommendation must be advised that the court's refusal to accept the sentencing recommendation will not entitle the defendant to withdraw the plea.

Section 6B1.1(c) deals with the timing of the court's decision whether to accept the plea agreement. Rule 11(e)(2) gives the court discretion to

accept the plea agreement immediately or defer acceptance pending consideration of the presentence report. Prior to the guidelines, an immediate decision was permissible because, under Rule 32(c), Fed. R. Crim. P., the defendant could waive preparation of the presentence report. Section 6B1.1(c) reflects the changes in practice required by § 6A1.1 and amended Rule 32(c)(1). Since a presentence report normally will be prepared, the court must defer acceptance of the plea agreement until the court has had an opportunity to consider the presentence report.